

1 Timothy D. Shea, WSBA #39631
tshea@wshblaw.com

The Honorable Ricardo S. Martinez

2 WOOD, SMITH, HENNING & BERMAN LLP
3 520 Pike Street, Suite 1525
4 Seattle, Washington 98101-4001
5 Phone 206-204-6800
6 Fax 206-299-0400
7 Attorneys for Defendant

8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **AT SEATTLE**

11 KENNETH MACIORA,

12 Plaintiff,

13 v.

14 PMB HELIN DONOVAN, CHRISTINE
15 CARDWELL and DONALD MCPHEE,

16 Defendants.

Civil Action No. 16-CV-00295RSM

ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S AMENDED COMPLAINT

17 COME NOW the defendants, PMB Helin Donovan, Christie Cardwell and Donald
18 McPhee, through the undersigned counsel, and answer Plaintiff's Amended Complaint as
19 follows.

20 1.1 In answer to paragraph 1 of the Amended Complaint, Defendants deny the same.
21 1.2 In answer to paragraph 2 of the Amended Complaint, Defendants deny the same.
22 1.3 In answer to paragraph 3 of the Amended Complaint, Defendants admit that they
23 signed an auditor opinion dated April 7, 2015. Defendants admit that Ms. Cardwell was
24 contacted by a former MyECheck employee on or about August 26, 2015. Defendants deny all
25 remaining allegations contained in paragraph 3 of the Amended Complaint.

1.4 In answer to paragraph 4 of the Amended Complaint, the Form 10 speaks for

ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFF'S AMENDED COMPLAINT - 1
(16-CV-00295RSM)

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1 itself. Defendants deny the remaining allegations contained in paragraph 4 of the Amended
2 Complaint.

3 1.5 In answer to paragraph 5 of the Amended Complaint, Defendants deny the same.

4 **JURISDICTION AND VENUE**

5 2.1 In answer to paragraphs 6 and 7 of the Amended Complaint, Defendants deny that
6 plaintiff has asserted, or has, a factually and/or legally sufficient claim arising under the
7 Exchange or Securities Act. Defendants admit that jurisdiction and venue in this court are
8 proper.

9 **DEFENDANTS**

10 3.1 In answer to paragraphs 8, 9 and 10 of the Amended Complaint, information
11 contained on Defendants' website speaks for itself. Defendants admit that it is a LLP with
12 offices across the United States, including in Seattle, WA, and that it has employees and
13 partners. Defendants admit that the second paragraph of paragraph 8 identifies some of the
14 partners of Defendant PMB. Defendants admit the allegations contained in paragraph 9 and 10.
15 Defendants deny the remaining allegations contained in paragraph 8, and to the extent not
16 admitted to herein, the remaining allegations of paragraphs 9 and 10 of the Amended Complaint,
17 putting the plaintiff to his proof.

18 **ALLEGATIONS: "THE SCHEME"**

19 4.1 Paragraph 11 of the Amended Complaint is a statement of the plaintiff's position,
20 and states a legal conclusion, requiring no answer.

21 4.2 Paragraph 12 of the Amended Complaint is a statement of the plaintiff's position,
22 and states a legal conclusion, requiring no answer. To the extent an answer is required,
23 Defendants admit that it performed some audit functions for MyECheck. Defendants deny the
24 remaining allegations contained in paragraph 12 of the Amended Complaint, putting the plaintiff
25 to his proof.

1 4.3 The first sentence of paragraph 13 of the Amended Complaint is a statement of
2 the plaintiff's position, and states a legal conclusion, requiring no answer. Defendants deny the
3 second sentence of paragraph 13.

4 4.4 Paragraph 14 of the Amended Complaint is a statement of the plaintiff's position,
5 and states a legal conclusion, requiring no answer. To the extent an answer is required,
6 Defendants deny the allegations contained in paragraph 14 of the Amended Complaint.

7 4.5 Defendants deny the allegations contained in paragraph 15 of the Amended
8 Complaint.

9 4.6 Defendants deny the allegations contained in paragraph 16 of the Amended
10 Complaint.

11 4.7 Defendants deny the allegations contained in paragraph 17 of the Amended
12 Complaint.

13 4.8 In answer to paragraph 18 of the Amended Complaint, Defendants admit that
14 plaintiff sent Defendants an email on October 22, 2015, with attachments. Defendants deny the
15 remaining allegations contained in paragraph 18 of the Amended Complaint.

16 4.9 Defendants deny the allegations contained in paragraph 19 of the Amended
17 Complaint.

18 4.10 In answer to paragraph 20 of the Amended Complaint, Defendants admit that
19 plaintiff sent Defendant McPhee a letter on or about November 23, 2015. Defendants deny the
20 remaining allegations contained in paragraph 20 of the Amended Complaint.

21 4.11 Defendants deny the allegations contained in paragraph 21 of the Amended
22 Complaint.

23 4.12 Defendants deny the allegations contained in paragraph 22 of the Amended
24 Complaint.

25 4.13 Defendants deny the allegations contained in paragraph 23 of the Amended

1 Complaint.

2 4.14 Defendants deny the allegations contained in paragraph 24 of the Amended
3 Complaint.

4 4.15 Defendants deny the allegations contained in paragraph 25 of the Amended
5 Complaint.

6 4.16 In answer to paragraph 26 of the Amended Complaint, the first three sentences are
7 statement of the plaintiff's position requiring no response. The Form 10 speaks for itself, and
8 Defendants deny all of plaintiff's allegations regarding the same. Defendants deny the remaining
9 allegations contained in paragraph 26 of the Amended Complaint.

10 **"THE FRAUDULENT SCHEME"**

11 4.17 Defendants deny the allegations contained within paragraph/heading "A" on page
12 14 of the Amended Complaint.

13 4.18 In answer to paragraph 27 of the Amended Complaint, Defendants admit that
14 plaintiff contacted them in October and November 2015. Defendants deny the remaining
15 allegations of paragraph 27 of the Amended Complaint, putting plaintiff to his proof.

16 4.19 In answer to paragraph 28 of the Amended Complaint, Defendants admit that
17 plaintiff emailed Defendant Cardwell on or about October 22, 2015, defendants deny the
18 remainder of the allegations contained in the fourth sentence of paragraph 28. Defendants lack
19 knowledge as to the truth or falsity of the allegations contained in the second and sixth sentences
20 of paragraph 28, putting plaintiff to his proof. Defendants deny all remaining allegations
21 contained in paragraph 28 of the Amended Complaint. the last sentence of paragraph 28.

22 4.20 Defendants deny the allegations contained in paragraph 29 of the Amended
23 Complaint.

24 4.21 Defendants deny the allegations contained within paragraph/heading "B" on page
25 16 of the Amended Complaint.

4.22 In answer to paragraph 30 of the Amended Complaint, the first, second and third sentences state or seek a legation requiring no answer. Defendants deny the remaining allegations of paragraph 30 of the Amended Complaint.

4.23 Defendants deny the allegations contained in paragraph 31 of the Amended Complaint.

4.24 Defendants deny the allegations contained within paragraph/heading "C" on page 16 of the Amended Complaint.

4.25 In answer to paragraph 32 of the Amended Complaint, Defendants admit to receiving an email on August 22, 2015, defendants deny that such email attached valid employment agreements. Defendants deny the remaining allegations contained in paragraph 32 of the Amended Complaint.

4.26 Defendants deny the allegations contained in paragraph 33 of the Amended Complaint.

4.27 Defendants deny the allegations contained within paragraph/heading "D" on page 17 of the Amended Complaint.

4.28 In answer to paragraph 34 of the Amended Complaint, Defendants admit to receiving an email on August 22, 2015, defendants deny that such email attached valid employment agreements. Defendants deny the remaining allegations contained in paragraph 34 of the Amended Complaint.

4.29 Defendants deny the allegations contained in paragraph 35 of the Amended Complaint.

FIRST CLAIM

Violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Exchange Act of 1934

5.1 In answer to the first sentence of paragraph 36 of the Amended Complaint,

1 Defendants reallege, as if set forth herein, all of there answers to all preceding paragraphs of the
2 Amended Complaint, including specifically paragraphs 1-35. The remaining sentences of
3 paragraph 36 state and/or seek a legal conclusion, requiring no response. Defendants deny any
4 allegations that may be asserted against them in paragraph 36.

5 5.2 In answer to paragraph 37 of the Amended Complaint, Defendants admit that they
6 audited the financial statements prepared by the Company, and that Defendants compiled and
7 signed an independent audit report, and that they met the requisite standard of care. To the
8 extent not specifically admitted to herein, Defendants deny all remaining allegations contained in
9 paragraph 37 of the Amended Complaint.

10 5.3 Defendants deny the allegations contained in paragraph 38 of the Amended
11 Complaint.

12 **SECOND CLAIM**

13 **Aiding and Abetting MyECheck's Violations of Section 10(b) and** 14 **Rule 10b-5 of the Exchange Act of 1934**

15 5.4 In answer to paragraph 39 of the Amended Complaint, Defendants reallege, as if
16 set forth herein, all of there answers to all preceding paragraphs of the Amended Complaint,
17 including specifically paragraphs 1-38.

18 5.5 In answer to paragraph 40 of the Amended Complaint, Defendants admit that they
19 audited the financial statements prepared by the Company, and that Defendants compiled and
20 signed an independent audit report. The third sentence of paragraph 40 is a statement of the
21 plaintiff's position requiring no response. Defendants deny the remaining allegations contained
22 in paragraph 40 of the Amended Complaint.

23 5.6 Defendants deny the allegations contained in paragraph 41 of the Amended
24 Complaint.

1 **THIRD CLAIM**

2 **Violation of Section 10(a) of the Exchange Act of 1934**

3 5.7 In answer to paragraph 42 of the Amended Complaint, Defendants reallege, as if
4 set forth herein, all of there answers to all preceding paragraphs of the Amended Complaint,
5 including specifically paragraphs 1-41.

6 5.8 The allegations contained in 43 of the Amended Complaint state and/or seek a
7 legal conclusion, requiring no response. Defendants deny any allegations that may be asserted
8 against them in paragraph 43.

9 5.9 Defendants deny the allegations contained in paragraph 44 of the Amended
10 Complaint.

11 5.10 Defendants deny the allegations contained in paragraph 45 of the Amended
12 Complaint.

13 **FOURTH CLAIM**

14 **Aiding and Abetting Violations of Section 13(a) of the Exchange Act**
15 **and Exchange Act Rules 13a-1, 13a-13 and 12b-20**

16 5.11 In answer to paragraph 46 of the Amended Complaint, Defendants reallege, as if
17 set forth herein, all of there answers to all preceding paragraphs of the Amended Complaint,
18 including specifically paragraphs 1-45.

19 5.12 The allegations contained in 47 of the Amended Complaint state and/or seek a
20 legal conclusion, requiring no response. Defendants deny any allegations that may be asserted
21 against them in paragraph 47.

22 5.13 Defendants deny the allegations contained in paragraph 48 of the Amended
23 Complaint.

1 **FIFTH CLAIM**

2 **Aiding and Abetting Violations of Section 13(b) of the**
3 **Exchange Act of 1934 and Securities Act Rule 13b2-1**

4 5.14 In answer to paragraph 49 of the Amended Complaint, Defendants reallege, as if
5 set forth herein, all of there answers to all preceding paragraphs of the Amended Complaint,
6 including specifically paragraphs 1-48.

7 5.15 The allegations contained in 50 of the Amended Complaint state and/or seek a
8 legal conclusion, requiring no response. Defendants deny any allegations that may be asserted
9 against them in paragraph 50.

10 5.16 Defendants deny the allegations contained in paragraph 51 of the Amended
11 Complaint.

12 **SIXTH CLAIM**

13 **Negligence**

14 5.17 In answer to paragraph 52 of the Amended Complaint, Defendants reallege, as if
15 set forth herein, all of there answers to all preceding paragraphs of the Amended Complaint,
16 including specifically paragraphs 1-51.

17 5.18 Defendants deny the allegations contained in paragraph 53 of the Amended
18 Complaint.

19 5.19 Defendants deny the allegations contained in paragraph 54 of the Amended
20 Complaint.

21 5.20 Defendants deny the allegations contained in paragraph 55 of the Amended
22 Complaint.

23 5.21 Defendants deny the allegations contained in paragraph 56 of the Amended
24 Complaint.

25 5.22 The allegations contained within the plaintiff's "Prayer for Relief" constitute a

1 statement of the plaintiff's position, requiring no answer. To the extent an answer is deemed
2 necessary, Defendants deny that the plaintiff is entitled to any of the relief sought in plaintiff's
3 "Prayer for Relief" including all paragraphs of the same.

4 **AFFIRMATIVE DEFENSES**

5 Having fully answered the plaintiff's Amended Complaint, Defendants assert the
6 following Affirmative Defenses:

7 6.1 As First Affirmative Defense, plaintiff fails to state a claim for which relief may
8 be granted.

9 6.2 As Second Affirmative Defense, plaintiff failed to join a party under FRCP 19.

10 6.3 As Third Affirmative Defense, plaintiff lacks standing for the claims he asserts.

11 6.4 As Fourth Affirmative Defense, plaintiff's claims may be barred by the doctrine's
12 of judicial estoppel, res judicata, and/or issue preclusion.

13 6.5 As Fifth Affirmative Defense plaintiff's alleged damages, if any, were caused in
14 whole or in part by the plaintiff and plaintiff's own negligence or conduct.

15 6.6 As Sixth Affirmative Defense plaintiff's alleged damages, if any, were the fault
16 of, or caused by, third parties over whom Defendants had no right to control, including Rod
17 Zalunardo.

18 6.7 As Seventh Affirmative Defense plaintiff's claims may be barred by the doctrines
19 laches, unclean hands or waiver.

20 6.8 As Eighth Affirmative Defense plaintiff's claims may be barred by the applicable
21 statute of limitation.

22 6.9 As Ninth Affirmative Defense plaintiff failed to mitigate his damages, if any.

23 6.10 As Tenth Affirmative Defense plaintiff's claims may be barred by order of
24 another court in another jurisdiction.
25

1 Defendants reserve the right to amend its answer and to add additional affirmative
2 defenses, counterclaims, cross claims, and/or third-party claims as additional investigation,
3 discovery, and circumstances warrant.

4 WHEREFORE, having fully answered Plaintiff's Amended Complaint, Defendants pray
5 for relief as follows:

- 6 1. That Plaintiff's Amended Complaint be dismissed with prejudice;
- 7 2. That Defendants have and recover judgment in their favor;
- 8 3. That judgment in Defendants' favor include recovery of its costs, disbursements,
9 and attorney fees incurred herein, and
- 10 4. For other just and equitable relief deemed appropriate by the Court.

11
12 DATED: April 1, 2016

WOOD, SMITH, HENNING & BERMAN LLP

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14
15 *s/ Timothy D. Shea*

16 Timothy D. Shea, WSBA #39631

tshea@wshblaw.com

17 WOOD, SMITH, HENNING & BERMAN LLP

18 520 Pike Street, Suite 1525

Seattle, WA 98101-4001

19 Phone 206-204-6800

Fax 206-299-0400

20 Attorneys for Defendants
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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I electronically filed this Answer and Affirmative Defenses to Plaintiff's Amended Complaint with the Clerk of the Court using the CM/ECF.

I hereby certify that the following has been served via U.S. Mail:

Kenneth Maciora
72 Adelhaide Lane
East Islip, NY 11730

DATED this 1st day of April, 2016.



Renee Faulds
rfaulds@wshblaw.com
Legal Assistant

LEGAL:05488-0528/5546070.1